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No. 93-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Elizabeth Ridgeway, *et al.*,
Petitioners,

v.

Pfizer, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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ARGUMENT

I. *MARINO* DID NOT RESOLVE THE QUESTION PRESENTED IN THIS CASE OR ERADICATE THE SPLIT AMONG THE CIRCUITS.

Respondents' principal argument in opposition is that review is unwarranted because the split in the circuits described by petitioners is "nonexistent." Bowling Opp. at 10; Pfizer Opp. at 7-10. They claim, first, that the initial question presented in this case -- whether nonintervening, unnamed class members have standing to appeal a class certification and class action settlement -- was already resolved by *Marino v. Ortiz*, 484 U.S. 301 (1988). Having made this claim, they assert that the pre-*Marino* cases cited in the petition are irrelevant, and that, since *Marino* was decided, every court of appeals to consider the issue has concluded that only intervening class members have standing to appeal a settlement's approval.[1]

Respondents are wrong on all counts. First, *Marino* did not resolve the question of whether absent class members must intervene in order to have standing to appeal. Unlike petitioners, the objectors in *Marino* were not even members of the class action at issue. Rather, they were an unofficial group of *white* police officers who sought to challenge a consent decree settling a Title VII lawsuit which provided that *black* and *hispanic* candidates for promotions on the police force would receive favorable treatment.

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[1] Respondents do not even address the issue, also encompassed within the initial question presented in this case, of whether an unnamed class member has standing to appeal an order *certifying a class action*. All the cases cited by respondents concern appeals of orders resolving the *merits* of class action cases. This omission is not surprising, since it makes particularly little sense to require class members to intervene in order to establish that they should not have been included in the class in the first place.

This Court held that, "because petitioners were not *parties to the underlying lawsuit*, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving the lawsuit's settlement." 484 U.S. at 304 (emphasis added).

Despite the fact that *Marino* only addressed the question of whether nonintervening *strangers* to a class action have standing to appeal a settlement's approval, respondents seize on *Marino*'s reference to "parties to the underlying lawsuit" and maintain that this Court must have intended its limitation on appellate standing also to encompass unnamed *class members* who object but do not formally intervene in the proceedings. What respondents forget is that unnamed class members have often been denominated and treated as "parties" by this Court and others, without regard to whether the class members have formally intervened in the action. *See, e.g.*, *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 177 (1989) (Scalia, J., dissenting) ("In Rule 23 class actions, the members of a class which qualifies for certification are *parties* to the action . . ..") (emphasis added); *American Pipe and Construction Co v. Utah*, 414 U.S. 538, 550-51 (1974) ("claimed members of the class st[an]d as *parties* to the suit until and unless they . . . cho[o]se not to continue") (emphasis added); *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1310 (9th Cir. 1982) ("On some occasions, courts have expressly described class members as *parties*") (emphasis added), *aff'd sub nom. Arizona v. U.S.D.C. for the Dist. of Arizona*, 459 U.S. 1191 (1983). Indeed, a leading authority on class action procedure has recognized that "[c]ertainly class members are *parties* for purposes of . . . objecting to and appealing from an order approving a class settlement . . .." Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992) (emphasis added).

Thus, *Marino*'s holding that only "parties" have standing to appeal a class action settlement's approval cannot be construed to bar nonintervening, unnamed class members from obtaining

appellate review. In fact, given this Court's tendency to refer to unnamed class members as "parties," *Marino* supports the opposite result. In any event, as the Third Circuit has recognized, *Marino* did not "settle[ ] whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307 (3d Cir. 1993).[2]

Given that *Marino* is not dispositive of the intervention question presented in this case, all the pre-*Marino* cases holding that absent class members have standing to appeal class action settlements are still good law.[3] These decisions are in direct conflict with the rulings of four other circuits, including the Sixth Circuit's decisions in this and two other unpublished cases.[4]

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[2] *Marino* also did not alter the views of the three leading treatises on class action procedure that intervention is *not* required for absent class members to have standing to appeal. *See* James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.80[5], at 23-496 (Matthew Bender, 1993); Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992); Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure*, § 1797, at 360-61 (West, 2d ed. 1986 & Supp. 1994).

[3] *See In re Cement Antitrust Litig.*, 688 F.2d at 1309; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (7th Cir. 1980); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (7th Cir. 1976); *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971); *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970).

[4] *See Gottlieb v. Wiles*, 11 F.3d 1004, 1012 (10th Cir. 1993); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (5th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (6th Cir. 1988); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988); *Thompson v. Kentucky*, 827 F.2d 770 (Table) (6th Cir. 1987); *Guthrie v. Evans*, 815 F.2d 626, 627 (11th Cir. 1987).

Respondents also err in claiming that, since *Marino*, all courts of appeals to consider the issue have held that intervention is a condition of appealing a settlement's approval. In fact, both the Third and Seventh Circuits have recently affirmed that, notwithstanding *Marino*, intervention is *not* a prerequisite for appeal. *See Carlough, et al. v. Amchem*, 5 F.3d 707, 714 (3d Cir. 1993); *Bell Atlantic Corp.*, 2 F.3d at 1310; *Matter of VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 368 (7th Cir. 1992).

Respondents' attempts to distinguish these cases are unavailing. According to Pfizer, *Bell Atlantic* and *Carlough* are not on point because the former was a shareholders' derivative action and the latter considered the standing question in a different procedural posture than that presented here. *See* Pfizer Opp. at 9. These are distinctions without a difference, because, in both cases, the Third Circuit strictly adhered to its pre-*Marino* precedents in holding that intervention is not a prerequisite for appellate standing.

In *Bell Atlantic*, following a lengthy discussion of the deep split in the circuits over the intervention question presented in this case, the Third Circuit held that nonintervening, objecting shareholders have standing to appeal the approval of a *derivative* action. 2 F.3d at 1310. In a footnote, the court stated that "[t]he parties have not contended and we need not decide whether different rules apply to objector appellate standing in class and derivative suits." *Id.* at 1037 n.4. In *Carlough*, however, the court went one step further to hold that intervention is not required to confer appellate standing on absent members of a *class* action. 5 F.3d at 714.

The *Carlough* appellants were class members who moved to intervene in the district court to object to the proposed settlement of a class action. Following the district court's denial of their intervention motion, the class members took an immediate appeal to the Third Circuit. The settling parties, both of whom opposed intervention, asserted that the district court's order was

not immediately appealable because, as objecting class members, the appellants would be able to appeal from any final order in the case. The objecting class members disagreed, arguing that immediate appeal was essential and appropriate because, to the extent the Third Circuit were to follow the lead of the Fifth, Eighth, and Tenth Circuits, *see supra* at n.4, the district court's order denying their motion to intervene would deprive them of standing to appeal any final decision approving the settlement. *Id.* at 713.

In language directly relevant to this case, the Third Circuit rejected this argument, stating that the decisions in other circuits requiring intervention as a condition of appeal "are directly contrary to our own holding in *Ace Heating and Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971)." The Third Circuit emphasized that *Ace Heating*, which held that nonintervening, objecting class members have standing to appeal a class action settlement, was still binding precedent, especially in cases where -- as here -- the appeal was taken from an order approving a settlement (as opposed to a case litigated to judgment) and where -- as here -- the appellants participated in the proceedings before the district court. *Id.* at 714. The Court added that "[o]ur adherence to *Ace Heating* despite contrary rulings by other courts of appeals, including the rulings of *Croyden*, *Guthrie*, and *Walker*, all of which were cited in *Bell Atlantic*, is particularly appropriate in the context of a nationwide consolidation of mass tort litigation." *Id.*

Thus, in *Carlough*, the Third Circuit firmly and unequivocally held that unnamed class members do not need to intervene in order to have standing to appeal. This was despite the decision in *Marino*, which was decided well before *Carlough*. Pfizer's claim that, notwithstanding *Carlough*, "this Court would benefit by allowing the issue to mature" (Pfizer Opp. at 10) warrants no consideration.

Equally unconvincing is respondents' attempt to distinguish

the Seventh Circuit's post-*Marino* decision in *Matter of VMS Ltd. Partnership Securities Lit.*, 976 F.2d at 362. There, appellant was an unnamed, nonintervening class member who sought to appeal a *post*-settlement order implementing a class action settlement agreement. Although the Seventh Circuit dismissed the appeal for failure to intervene, it held that its pre-*Marino* decision in *Research Corp v. Asgrow Seed Co.*, 425 F.2d 1059 (1970), which stated that nonintervening class members have standing to appeal a settlement's approval, "would control in this circuit if [appellant] were appealing the approval of the settlement agreement (which it did not do) . . .." *Id.* at 368. Thus, the Seventh Circuit, like the Third Circuit, has made it crystal clear that nonintervening class members have standing to appeal a decision approving a settlement, despite the contrary rulings of four other circuits and notwithstanding the Supreme Court's decision in *Marino*.

In short, the split in the circuits with respect to the issue presented in this case is alive and festering. Further percolation among the lower courts will not assist this Court, since the courts of appeals have had ample opportunity to interpret and apply *Marino* -- with markedly different results. The issue is thus fully mature and ripe for resolution.

II. THE FACTS OF THIS CASE RENDER IT WHOLLY SUITABLE FOR REVIEW.

Respondents' second main line of attack is that the "unique" and "unusual" facts of this case make it unsuitable for review by this Court. Bowling Opp. at 11; Pfizer Opp. at 17. In fact, however, this case presents the intervention question in an entirely straightforward fashion. Petitioners are class members who objected to a proposed settlement but did not move formally to intervene prior to a decision certifying the class and approving the settlement. The intervention issue is not dependent on the underlying facts of the proceeding; it is simply whether, absent intervention, unnamed class members have standing to appeal. Respondents' assertions about the so-called unique facts of this

case are merely diversionary.[5]

Respondents attempt to make much of the fact that petitioners did not elect to opt out of the proceeding when they had the chance, choosing instead to remain in the class and object to the settlement. As explained in the petition, however, petitioners determined that they could not opt out of the *Bowling* settlement because, as they saw it, they had a fiduciary responsibility to protect the rights of the members of the putative Pennsylvania class whom they sought to represent in the *Taylor* proceeding. *See* Petition at 6.[6] Moreover, even if petitioners had no good reason to stay in the *Bowling* case, respondents' argument that their failure to opt out should preclude consideration of this case is tantamount to a claim that the issue presented here should *never* be decided -- since the only class members who could present it are class members who did not opt out.

Nor is the fact that petitioners' claims are still pending in the *Taylor* proceeding of any significance. If the *Bowling*

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[5] This is underscored by the scant nature of the Sixth Circuit's summary dismissal of petitioners' appeal. The Sixth Circuit did not rely on any "unique" or "unusual" facts to hold that petitioners lacked standing to appeal. To the contrary, the only "fact" stated in its skeletal order was that petitioners "are unnamed class members who neglected to intervene in the proceedings below." 1a.

[6] During the course of the proceedings in *Bowling*, petitioners' counsel asked the district court to certify a subclass that would conform to the class in *Taylor*. *See Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 161 (S.D. Ohio 1992). In response, the district court asked counsel for respondents if they would object to allowing petitioners to opt-out the entire *Taylor* class. Because respondents objected, the issue was dropped. RA 208 at 92-97. Moreover, contrary to respondents' argument, the district court did not extend the opt-out deadlines it set in the order approving notice to the class. RA 43. At a hearing held on May 19, 1992 (RA 140), certain class members asked the district court to extend the opt-out period to after the fairness hearing. The district court denied the motion (RA 140 at 46-48), stating that it had to "hold firm to the schedule we have." RA 140 at 54.

settlement is permitted to go forward, respondents will undoubtedly move for summary judgment in the *Taylor* proceeding, thereby extinguishing petitioners' claims in that action. In addition, as noted above, although petitioners could have opted out and pursued their own separate claims in *Taylor*, this would not have protected the unnamed members of the putative Pennsylvania class whom petitioners were duty bound to represent. Thus, the fact that "[p]etitioners already had their own separate lawsuit . . ." at the time the *Bowling* complaint was filed is a red herring. Pfizer Opp. at 18.

Respondents also press the point that petitioners are the only class members who are appealing the *Bowling* settlement. This is hardly unusual. In the class action context, it is rare indeed that numerous class members take an active role in the litigation. This is especially true in cases where, as here, a few class members take an extremely active role in forcefully advancing a wide range of objections to the settlement. If anything, the fact that petitioners are the last remaining challengers to the *Bowling* settlement counsels in *favor* of review being granted, since this is the only route by which there will be any appellate oversight of this class action affecting tens of thousands of heart-valve implantees world-wide.

Finally, the Bowling respondents argue that review is unwarranted because petitioners are allegedly pursuing "an unstated personal agenda that has nothing to do with the merits of the *Bowling* settlement" -- *i.e.*, "personal financial gain." Bowling Opp. at 12. This observation is ironic, since it is the Bowling respondents' counsel who have a substantial financial interest in harvesting the fruits of the proposed *Bowling* settlement -- an interest that is directly threatened by the prospect of appellate review. Moreover, petitioners will gain nothing if this Court grants review and recognizes their right to appeal unless they ultimately succeed in convincing the Sixth Circuit that the *Bowling* settlement is unfair. It is precisely because the Sixth Circuit has refused to hear petitioners' argument to that effect that review

should be granted by this Court.[7]

CONCLUSION

For the foregoing reasons, the Court should reject the arguments raised by respondents and grant this petition for a writ of *certiorari*.

Respectfully submitted,

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[7] With respect to the second question presented in the petition, respondents argue that the Sixth Circuit did not violate petitioners' right to due process by dismissing their appeal because "there is no right to appeal when an appellant lacks standing to appeal." Pfizer Opp. at 22. This argument begs the question, since the published decisions of the Sixth Circuit hold that nonintervening, unnamed class members *do* have standing to appeal a decision approving a class action settlement. *Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942). It is the Sixth Circuit's refusal to follow these published decisions -- decisions that clearly recognize a *right* to appellate review under the precise circumstances presented in this case -- that violated the Fifth Amendment's due process guarantee. Constitutional issues aside, the sheer unfairness of the Sixth Circuit's procedures constitutes such an extreme departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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